

1-1-2011

Again and Again we Suffer: The Poor and the Endurance of the "War on Drugs"

Brian Gilmore

Michigan State University College of Law, bgilmore@law.msu.edu

Follow this and additional works at: <http://digitalcommons.law.msu.edu/facpubs>



Part of the [Civil Rights and Discrimination Commons](#), [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Brian Gilmore, Again and Again we Suffer: The Poor and the Endurance of the "War on Drugs", 15 U.D.C. L. Rev. 59 (2011).

This Article is brought to you for free and open access by Digital Commons at Michigan State University College of Law. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Digital Commons at Michigan State University College of Law. For more information, please contact domannbr@law.msu.edu.

AGAIN AND AGAIN WE SUFFER: THE POOR AND THE ENDURANCE OF THE “WAR ON DRUGS”¹

Brian Gilmore*

Etymology

“Our drug policy has become a tale of two cities, or more accurately a tale of two classes – one rich and one poor.”²

- Congressmen Donald Payne

“Rather, the ‘drug war’ is crafted to target poor peasants abroad and poor people at home; by use of force, not constructive measures to alleviate the problems that allegedly motivate it, at a fraction of the cost.”³

- Noam Chomsky

“To center so much interest on drugs, drug users and the prevention of drug use is to mislocate the issues, and those who worry most about drugs are often really concerned about something else. The real issue isn’t the chemical substances but the blacks, the hippies, or the establishment . . .”⁴

- Lester Grinspoon

“This country used to have a war against poverty, now we have a war against the impoverished.”⁵

- Sean Dougherty

1 The term “War on Drugs” has numerous references, but all are consistent with U.S. policy approaches to drug enforcement. For purposes of this article, the term refers to the aggressive policies of the U.S. that were and are an attempt to control drugs in the United States. The discussion of those policies is summarized and discussed in RON CHEPESLUK, WAR ON DRUGS: AN INTERNATIONAL ENCYCLOPEDIA (ABC-CLIO 1999).

* The author is currently Clinical Associate Professor of Law, Michigan State University College of Law. He wishes to thank Jon Junia, Juris Doctorate candidate, 2011, Michigan State University College of Law for his invaluable assistance in researching and conceiving this article. In addition, the author thanks Dean Joan Howarth, Michigan State University College of Law.

2 Francis X. Clines, *After March, House Votes on Emotional Racial Issue*, N.Y. TIMES, Oct. 19, 1995, available at <http://www.nytimes.com/1995/10/19/us/after-march-house-votes-on-emotional-racial-issue.html?scp=11&sq=%22war+on+drugs%22%26+%22poor%22&st=nyt>.

3 NOAM CHOMSKY, ROGUE STATES: THE RULE OF FORCE IN WORLD AFFAIRS 80 (South End Press 2000).

4 Lester Grinspoon, *Bad Rap for Dope*, N.Y. TIMES, Mar. 27, 1977, available at <http://query.nytimes.com/mem/archive/pdf?res=F4061EF93C5A107B93C5AB1788D85F438785F9>

5 Sean Thomas Dougherty is the author of nine books, including BROKEN HALLELUJAH (BOA 2010), NIGHTSHIFT BELONGING TO LORCA, a finalist for the Paterson Poetry Prize, and EXCEPT BY FALLING, and winner of the 2000 Pinyon Press Poetry Prize from Mesa State College. He was a 2009 Fulbright Scholar in Macedonia. He now teaches at Case Western Reserve University. The above quote was posted on Facebook on December 6, 2010 and is used by permission of the author.

INTRODUCTION

In September 2010, after months of consideration, the Flint Michigan Housing Commission – the city of Flint’s provider of low cost housing to low income individuals and families – announced it was seriously considering requiring all residents of public housing to submit to testing for illegal drugs.⁶ In revealing the consideration of the proposal, Rodney Slaughter, Executive Director of the Flint Housing Commission, stated that people have the “right to live in a drug free, clean community.”⁷

Almost immediately, the Michigan chapter of the American Civil Liberties Union (“ACLU”) challenged the proposed policy, and described it as “unconstitutional.”⁸ The ACLU’s Rana Emir, director of the Michigan chapter of the ACLU, asserted that “being poor is not a crime in Michigan.”⁹ While proposals seeking to implement drug testing on public housing residents is not new, the Flint proposal was offered at an interesting moment. In fact, it had many symbolic qualities.

Specifically, while to a certain degree the “War on Drugs” is currently being reconsidered ideologically, the Flint proposal represents a continuation of the “War on Drugs” against the poor. Drug sentencing guidelines implemented during the “War on Drugs” continue to be challenged by advocates and members of the judiciary, and state governments continue to seek more economical and productive policies to address the drug problem in the United States.¹⁰ On the other hand, the Flint proposal and other similar ideas suggested by lawmakers reflect a different sentiment, but only because the target population is poor. In other words, the proposal follows in the same vein as similar failed policies of the larger “War on Drugs.”

This article examines the “War on Drugs” as it continues to repress the poor, focusing specifically on housing and government assistance programs. It asks specifically: if implementation of the “War on Drugs” is so wrong according to so many people, why does it continue against the poor in so many ways?

Part I of this essay focuses on the “War on Drugs,” and its rise and failure since it began more than 35 years ago during the Reagan Administration.

Part II concentrates on developments in U.S. anti-drug policy that indicate an evolving paradigm with respect to the “War on Drugs” and its actual policy.

Part III discusses the manner in which the “War on Drugs” has affected the poor and those residing in public housing.

6 Kim Koslowski, *Flint Eyes Drug Testing For Public Housing Residents*, THE DETROIT NEWS, Sept. 13, 2010.

7 *Id.*

8 *Id.*

9 *Id.*

10 ALAN P. SCHMIDTBERG, AREN’T YOU TIRED OF IT YET? 62 (Hillcrest Publishing Group 2007).

Finally, this article concludes with some tactical suggestions for advocates who hope to prevent the encroachment of the basic inequities of the “War on Drugs” on the lives of poor people.

First, this article provides a brief examination of the “War on Drugs” in the United States.

I. THE WAR ON DRUGS: A BRIEF BIO

A. Prohibition

I knew that we had reached a perilous position in the war on drugs. I knew that a President had gone out his way to stage a buy across from the White House and I felt it was a Gulf of Tonkin moment. A ploy to allow a wave of fear and ignorance to on one hand bring in the many capitalist forces who would make money off the war on drugs (corporate prisons mainly), and it would target the least powerful and most impoverished citizens. It was a low moment in American history and resulted in us moving to the country with the highest percentage of incarcerated citizens.¹¹

The above comment, by Washington D.C. writer Kenneth Carroll,¹² summarizes the moment the “War on Drugs” in the United States began anew. There was a “War on Drugs” before this date; however, it was not until a dramatic prime time speech by President George H.W. Bush (“President Bush”) that illegal drugs returned squarely to the forefront of political policy in the U.S.¹³

For dramatic effect, President Bush arranged a purchase of crack cocaine across the street from the White House in Lafayette Park.¹⁴ In seeking to dramatize the nation’s struggle with illegal drugs, President Bush wanted to show the proceeds of the purchase to a prime time audience in order to justify declaring war on drugs.¹⁵ His victim that night was Keith Timothy Jackson, an eighteen-year-old high school student and small time drug peddler, who famously did not

11 E-mail from Kenneth Carroll (Nov 2, 2010).

12 A native Washingtonian writer, Kenneth Carroll’s poetry, short stories, essays, and plays have appeared in *Black Literature Forum*, *The Lion Speaks: An Anthology for Hurricane Kairina*, *In Search Of Color Everywhere*, *Bum Rush The Page*, and *American Poetry: The Next Generation*. His book of poetry, *So What: For The White Dude Who Said This Ain’t Poetry*, was published in 1997 by Bunny & The Crocodile Press. He has had three plays produced: *The Mask*, *Walking To Be Free*, and *Make My Funk The P-Funk*. He is Executive Director of DC Writers Corps and past president of the African American Writers Guild. He received a 2005 Literary Fellowship from the DC Commission on the Arts and Humanities, was nominated for a 2004 Pushcart Prize for Poetry, and received the Mayor’s Arts Award for Service to the Arts. He was named one of WETA’s Hometown Heroes in 2004. Biography accessed at <http://washingtonart.com/beltway/carroll3.html>.

13 Michael Isikoff, *Drug Buy Set Up for Bush Speech*, WASH. POST, Sept. 22, 1989, at A01.

14 NATASHA TARPLEY, TESTIMONY: YOUNG AFRICAN AMERICANS ON SELF DISCOVERY AND BLACK IDENTITY 27-28 (Beacon Press 1995).

15 *Id.*

even know where the White House was located when the undercover agents from the Drug Enforcement Administration sought to lure him downtown; Jackson thought Ronald Reagan was still President.¹⁶

The modern version of the “War on Drugs” was declared that night by President Bush using the crack that was purchased from Jackson as a prop for his prime time address. President Bush described the illegal drug problem in the United States as “so important, so threatening, that it warranted talking to you, the American people.”¹⁷ According to President Bush, millions of people had used illegal drugs and millions used illegal drugs on a daily basis, despite massive efforts to address the problem.¹⁸ Cocaine use was rampant and even though there had been a focus on incarceration, public service announcements condemning illegal drug use, and other programs designed to address the problem, the frequent use of drugs had increased.¹⁹

But even with most statistics strongly suggesting that an incarceration approach to drug enforcement was misguided, President Bush elected to implement this strategy to address the nation’s drug problem; he labeled it a “war.”²⁰ In particular, while President Bush’s war sought to address the problems in many ways, the key component was law enforcement and the expansion of the criminal justice system.²¹ “We need more prisons, more jails, more courts, more prosecutors,” President Bush announced.²² He requested \$500 million in his address to implement that part of his strategy.²³

While requesting \$500 million for incarceration in the “War on Drugs,” President Bush also requested a rather paltry \$50 million to assist the poor – mainly federal funding specifically meant for public housing residents.²⁴ This request was included because President Bush noted that order needed to be restored in housing projects.²⁵

The policy direction made official by President Bush on September 5, 1989 was no surprise.²⁶ It represented America’s policy against illegal drugs that can be

16 CLARENCE LUSANE & DENNIS DESMOND, PIPE DREAM BLUES: RACISM AND THE WAR ON DRUGS 67-70 (South End Press 1991).

17 GEORGE H.W. BUSH, SPEAKING OF FREEDOM: THE COLLECTED SPEECHES 82 (Simon and Schuster 2009).

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 GEORGE H.W. BUSH, SPEAKING OF FREEDOM: THE COLLECTED SPEECHES 82 (Simon and Schuster 2009).

24 *Id.*

25 *Id.*

26 *Id.*

summed up with one word: prohibition.²⁷ This has been the approach to America's drug problem ever since the U.S. decided to try to address it decades ago.

In 1914, the United States "first prohibited cocaine, heroin, and related drugs" and in 1937, marijuana was added to the list of prohibited substances.²⁸ This, to a certain extent, is when today's drug war actually began, because the foundation for the failed policy was laid during this period. The war, motivated by Christian morality, is a lost event in history:

We should understand that America's drug war started roughly 100 years ago. Protestant missionaries in China and other religious groups joined with other temperance organizations to convince Congress that drugs were evil and that drug users were dangerous, immoral people.²⁹

The author of the preceding passage, Timothy Lynch, is a former police officer and police chief, who witnessed the failed policies against drugs firsthand as a "beat cop."³⁰ In the passage, Lynch refers to a law known as the "Harrison Act," which he describes as a "radical change" in policy and an approach to chemical control that would result in major "social damage."³¹ According to Lynch, prior to 1914 no one could be arrested for the act of putting chemicals in their bloodstream.³²

The Harrison Act of 1914 was the beginning of the policies that, while well-intentioned, have not achieved the government's stated goals of stopping drug use in the United States.³³ Early social studies of the effects of the Harrison Act verified that individuals addicted to the now-illegal substances prior to the passage of the Harrison Act remained addicted and continued to seek access and obtain the illegal chemicals the government now prohibited.³⁴ However, the government's response to reports that those addicted still sought to obtain their

27 According to Merriam-Webster's Dictionary, 'prohibition' is defined as "the forbidding by law of the manufacture, transportation, and sale of alcoholic liquors except for medicinal and sacramental purposes." In this instance, the reference is to narcotics such as cocaine, marijuana, and heroin.

28 JEFFREY A. MIRON, *DRUG WAR CRIMES: THE CONSEQUENCES OF PROHIBITION* 1 (The Independent Institute 2004).

29 TIMOTHY LYNCH, *AFTER PROHIBITION: AN ADULT APPROACH TO DRUG POLICIES IN THE 21ST CENTURY* 124 (Cato Institute 2000).

30 *Id.*

31 *Id.*

32 *Id.* at 126.

33 See Harrison Act of 1914; Pub. L. No. 63-223, 38 Stat. 785, *repealed by* Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-971 (2006).

34 RAYMOND GOLDBERG, *DRUGS ACROSS THE SPECTRUM* 73-74 (Cengage Learning, Inc. 2010).

chemicals was fairly predictable: the government passed even more stringent laws.³⁵

In 1924, the government passed legislation rendering heroin completely illegal (previously physicians could prescribe the chemicals in heroin to their patients); in 1932, the federal government created the Federal Bureau of Narcotics, the precursor for today's Drug Enforcement Administration.³⁶ Harry J. Anslinger was the first Commissioner of the Bureau.³⁷ The black market for heroin expanded during this period.³⁸

Marijuana essentially became illegal in 1937 pursuant to the Marijuana Tax Act.³⁹ The use of marijuana required the payment of a tax for usage; failure to pay the tax resulted in a large fine or stiff prison time for tax evasion.⁴⁰ Drug prohibition was elevated to another level by targeting "marijuana," a plant that had never demonstrated any harm to anyone.⁴¹

Anslinger's efforts to eradicate marijuana continued when Anslinger sought similar anti-narcotic laws against marijuana at the state level.⁴² Guided by Anslinger's policy direction, states began passing their own laws or adopting more strident versions of federal laws.⁴³ By 1952, nearly all states had anti-narcotic laws in place.⁴⁴

In 1951, at the urging of Anslinger,⁴⁵ the federal government passed the Boggs Act, another attempt to aggressively control narcotics in the United States.⁴⁶ Interestingly enough, The Boggs Act was a piece of legislation that featured mandatory minimum sentences, the kind of sentences that are central to today's failed drug policies.⁴⁷ The Boggs Act was followed in 1956 by the Narcotic Con-

³⁵ *Id.*

³⁶ *Id.*

³⁷ <http://www.justice.gov/dea/history.htm> (last visited Dec. 3, 2011).

³⁸ Harry J. Anslinger is considered the most influential figure in the history of drug control in the United States. Anslinger directed the Federal Bureau of Narcotics from 1930-1962 and during that period pursued a policy of tough treatment for addicts and traffickers that continues to exist today. Anslinger was born in 1892 in Altoona, Pennsylvania and was singularly instrumental in the passage of the Marijuana Tax Act of 1937 that effectively created today's black market for marijuana today. Source: HOWARD PADWA, JACOB CUNNINGHAM, ADDICTION: A REFERENCE ENCYCLOPEDIA 74 (ABC-CLIO 2010).

³⁹ *Id.* at 75.

⁴⁰ *Id.*

⁴¹ GOLDBERG, *supra* note 34, at 74.

⁴² LAWRENCE MEIR FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 107 (Yale University Press 2004).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ ROBERT M. HARDAWAY, NO PRICE TOO HIGH: VICTIMLESS CRIMES AND THE NINTH AMENDMENT 101 (Greenwood Publishing 2003).

⁴⁶ SANDRA A. RASMUSSEN, ADDICTION TREATMENT: THEORY AND PRACTICE 25 (Russell Sage Publications 2000).

⁴⁷ HARDAWAY, *supra* note 45.

trol Act of 1956, a law that “increased sentences” and prosecuted “thousands of offenders.”⁴⁸ These new laws were just as unsuccessful as the Harrison Act.⁴⁹ Due to the failure of the many narcotics laws passed from 1918-1956, the 1960’s were a period of experimentation with different approaches to the issue of narcotics in society.⁵⁰

At the recommendation of the American Medical Association (“AMA”) and the American Bar Association (“ABA”), the government focused some of its resources in the area of rehabilitation and treatment of individuals addicted to illegal narcotics, as opposed to incarceration.⁵¹ However, a real commitment to this approach never materialized and there was never a complete change in the prohibition/incarceration approach during this period.⁵²

By the late 1960’s, amid student unrest on college campuses over the Vietnam War and the Civil Rights movement, the familiar tenets of the “drug war” that commenced in 1918 re-emerged as a key policy initiative of lawmakers.⁵³ Indeed in 1968, during his campaign for President of the United States, Richard Nixon identified the illegal drug problem as a national issue in order to “focus” his campaign.⁵⁴ President Nixon’s campaign promise was to link the illegal drug problem in the U.S. with social ills in society in order to justify a law and order approach to the problem.⁵⁵ The fact that this policy was pursued once he was elected is especially troubling considering that it was motivated by politics and a desire to link the issue to the growing anti-Vietnam War movement that Nixon confronted upon entering office in 1968.⁵⁶

In 1971, President Nixon created the Drug Enforcement Administration (“DEA”) and referred to illegal drugs as “public enemy number one.”⁵⁷ President Nixon’s decision was a fateful choice for the nation because it involved a traditional law and order approach.⁵⁸ The Rockefeller drug laws in New York soon followed President Nixon’s decision.

48 RASMUSSEN, *supra* note 46.

49 All of the available evidence as indicated by the various books and articles referenced in this article demonstrate that illegal drugs continue to be used daily in the United States.

50 DAVID F. MUSTO & PAMELA KORSMEYER, *THE QUEST FOR DRUG CONTROL* 182 (Yale University Press 2002).

51 JEFFREY JENSON & MARK FRASER, *SOCIAL POLICY FOR CHILDREN AND FAMILIES: A RISK AND RESILIENCE PERSPECTIVE* 207 (Sage Publications 2006).

52 *Id.* at 207-208.

53 NANCY E. MARION, *A HISTORY OF FEDERAL CRIME CONTROL 1960-1993* 77-78 (Greenwood Publishing Group 1994).

54 DEBORAH KOPS, *RACIAL PROFILING* 32 (Marshall Cavendish Books 2006).

55 JILL JONNES, *HEP CATS, NARCS, AND PIPE DREAMS: A HISTORY OF AMERICA’S ROMANCE WITH ILLEGAL DRUGS* 269-270 (John Hopkins University Press 1996).

56 *Id.*

57 MICHAEL NEWTON, *GANGS AND CRIME* 29 (Chelsea House Publications 2008).

58 MARION, *supra* note 53, at 77-78.

The Rockefeller drug laws are the first of the more notable laws passed to address the growing problem of drug abuse in the U.S. in the modern era.⁵⁹ The laws, named for New York Governor Nelson Rockefeller, were fairly simple: a conviction for a crime of possessing illegal drugs would result in a mandatory minimum sentence, with no flexibility.⁶⁰ Felonies classified as A-1 felonies would result in a sentence of 15 years to life in prison.⁶¹ Other lesser felonies would result in lighter sentences, but the mandatory minimum sentencing was harsh in most cases.⁶²

The initial legacy of the Rockefeller laws had little to do with the effectiveness of the laws. The legacy is that they spurred similar state anti-drug laws across the country.⁶³ In fact, forty-eight other states would pass similar "Rockefeller laws" in the years after the passage of the first Rockefeller laws by the state of New York.⁶⁴

The other by-product of Governor Nelson Rockefeller's anti-drug laws had to do with incarceration. While initially the incarceration rate did not increase, this did not last.⁶⁵ Incarceration rose significantly in New York once the laws began to be implemented.⁶⁶ This, of course, is one of the main features of the prohibition/incarceration approach to the control of illegal drugs.⁶⁷

The federal government's approach to drug control did not change much during the time period when the Rockefeller laws (or similar laws) began to dominate policymaking. The policy remained consistent after President Nixon's time in office.⁶⁸

For example, Presidents Gerald Ford and Jimmy Carter are not often associated with aggressive anti-drug policies in the U.S. during their times in office, but this is, in fact, not the case.⁶⁹ Presidents Ford and Carter continued the same illegal drug policies during their respective administrations that began decades

59 GEOFFREY CANADA, *FIST STICK KNIFE GUN: A PERSONAL HISTORY OF VIOLENCE IN AMERICA* 78 (Beacon Press 1996).

60 *Id.*

61 JENNIFER GONNERMAN, *LIFE ON THE OUTSIDE: THE PRISON* 52-53 (MACMILLAN BOOKS 2005).

62 JOEL SAMAHIA, *CRIMINAL JUSTICE* 373 (Thomson-West 2005).

63 GONNERMAN, *supra* note 61, at 53-54.

64 GONNERMAN, *supra* note 61, at 53-54.

65 SAMAHIA, *supra* note 62, at 373.

66 *See infra* notes 67-68.

67 According to the Bureau of Justice Statistics, available at <http://drugwarfacts.org/cms/?q=node/62>. "Starting in 1973, however, the prison population and imprisonment rates began to rise precipitously. This change was fueled by stiffer sentencing and release laws and decisions by courts and parole boards, which sent more offenders to prison and kept them there for longer terms."

68 JEFFREY JENSON, MARK FRASER, *SOCIAL POLICY FOR CHILDREN AND FAMILIES: A RISK AND RESILIENCE PERSPECTIVE* 208 (Sage Publications 2006).

69 EVA BERTRAM, *DRUG WAR POLITICS: THE PRICE OF DENIAL* 5 (University of California Press 1998).

before them, though with “less fanfare and public attention.”⁷⁰ Under President Reagan, the federal government became far more aggressive in seeking to address the drug problem.⁷¹ In addition, while President Reagan’s policies of drug enforcement maintained the same approach that began in 1918 with the Harrison Act, his effort had an additional tool in the battle against illegal drugs: his wife, First Lady Nancy Reagan.⁷² Mrs. Reagan’s famous ‘Just Say No’ campaign is perhaps the most memorable occurrence of the Reagan years and the government’s efforts to control narcotics.⁷³

Our young people are helping us lead the way. Not long ago, in Oakland, California, I was asked by a group of children what to do if they were offered drugs, and I answered, “Just say no.” Soon after that, those children in Oakland formed a Just Say No club, and now there are over 10,000 such clubs all over the country. Well, their participation and their courage in saying “no” needs our encouragement. We can help by using every opportunity to force the issue of not using drugs to the point of making others uncomfortable, even if it means making ourselves unpopular.⁷⁴

Still, President Reagan’s efforts at drug enforcement were hardly as simplistic as his wife’s now legendary slogan. Upon taking office, President Reagan immediately authorized the military to assist law enforcement in its drug enforcement efforts, an unprecedented shift in the use of government power.⁷⁵ In addition, President Reagan authorized, by executive order, the nation’s intelligence apparatus⁷⁶ to also assist in drug enforcement efforts.⁷⁷ He signed several pieces of major anti-drug legislation, including The Anti-Drug Abuse Act of 1986 and 1988 and the National Narcotics Leadership Act of 1984.⁷⁸

President Bush succeeded President Reagan, and as has been stated previously, it is President Bush who is most associated with the commencement of the modern day “War on Drugs.”⁷⁹ With the aggressive pursuit of anti-drug laws under President Reagan and the various laws passed, President Bush could easily

⁷⁰ *Id.*

⁷¹ ANDREW BUSCH, RONALD REAGAN AND THE POLITICS OF FREEDOM 158 (Rowman and Littlefield 2001).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Speech, Nancy Reagan, September 14, 1986; text source: <http://www.cnn.com/SPECIALS/2004/reagan/stories/speech.archive/just.say.no.html>.

⁷⁵ ARNOLD S. TREBACH, THE GREAT DRUG WAR: AND RATIONAL PROPOSALS TO TURN THE TIDE 151 (Unlimited Publishing LLC 2005).

⁷⁶ “Intelligence apparatus” refers to various government agencies that engage in intelligence work such as the Central Intelligence Agency and the National Security Agency.

⁷⁷ *See supra*, note 75.

⁷⁸ SHAHI M. SHAHIDULLAH, CRIME POLICY IN AMERICA: LAWS, INSTITUTIONS AND PROGRAMS 14 (University Press of America 2008).

⁷⁹ NEIL BARNARD, WAR ON DRUGS: OPPOSING VIEWPOINTS 104 (Greenhaven Press 1990).

pursue an aggressive drug enforcement agenda.⁸⁰ Thus, it was easy for President Bush to expand the “public policy” space of narcotics control, increase “monetary funding” and create more “bureaus” to enforce the nation’s many narcotics laws.⁸¹

While one might wonder if the drug war changed in tactic or approach when a Democrat, William Jefferson Clinton, assumed office in 1993; this was hardly the case. President Clinton continued the same approach to the control of illegal narcotics as his predecessors and also proved to be a key figure in shaping U.S. policy on the issue.⁸²

One of the most well-known components of President Clinton’s policy on illegal drugs was his funding for 100,000 additional police officers nationwide.⁸³ The additional law enforcement officers were not all for drug enforcement, but some of the additional law enforcement officers would be used by states for this purpose.⁸⁴ President Clinton also committed \$15 billion to a special anti-drug command force under military supervision.⁸⁵ In sum, Clinton “lowered the rhetoric” during his administration, but he maintained the same policy nurtured over the years by most of his predecessors.⁸⁶

B. *A Record of Failure*

It’s a war without a clear enemy. Anything waged against a shapeless, intangible noun can never truly be won – President Clinton’s drug czar Gen. Barry McCaffrey said as much in 1996. And yet, within the past forty years, the U.S. government has spent over \$2.5 trillion dollars fighting the War on Drugs. Despite the ad campaigns, increased incarceration rates and a crack-down on smuggling, the number of illicit drug users in America has risen over the years and now sits at 19.9 million Americans.⁸⁷

⁸⁰ *Id.*

⁸¹ TONY PAYAN, COPS, SOLDIERS, AND DIPLOMATS: EXPLAINING AGENCY BEHAVIOR IN THE WAR ON DRUGS 2 (Lexington Books 2006).

⁸² ROGER PILON, THE RULE OF LAW IN THE WAKE OF CLINTON 70 (Cato Institute 2000).

⁸³ JOHN HOHENBURG, RE-ELECTING BILL CLINTON: WHY THE U.S. CHOSE A ‘NEW DEMOCRAT’ 140 (Syracuse University Press 1997).

⁸⁴ *Id.* at 139-40.

⁸⁵ *Id.* at 140.

⁸⁶ EVA BERTRAM, DRUG WAR POLITICS: THE PRICE OF DENIAL 5 (University of California Press 1998). President Clinton still pursued the same policies as other Presidents but did not engage in sensational moments such as President Bush’s famous speech to the nation where he held up crack cocaine purchased across from the White House.

⁸⁷ Claire Suddath, *The War on Drugs*, TIME, Mar. 25, 2009, available at <http://www.time.com/time/world/article/0,8599,1887488,00.html>.

The Rockefeller-type laws did not stop the illegal drug problem in New York or anywhere else.⁸⁸ The laws did result in mass imprisonment, but illegal drug activity continued and still continues today.⁸⁹ The other narcotics laws, federal and state, that were passed in the same spirit of the Rockefeller laws also failed to control narcotics.⁹⁰ This is so despite an outlay of billions of dollars over the years to address the problem.⁹¹ Eventually, political pressure resulted in a protracted campaign to reform the Rockefeller drug laws.⁹² The Rockefeller laws are, in fact, the template for the policy and the policy's failure spurred reform efforts that were to soon materialize in the wake of the failure of the laws.⁹³

From the very beginning, the evidence suggested the laws were not successful. New York's Addiction Services Agency conducted a survey of judges and other officials regarding the effectiveness of the laws and the results were revealing, especially in the area of deterrence of juveniles:

More than half of the judges and officials said that the laws, which have sentences of up to life in prison, have 'contributed to the worsening of the situation' by introducing juveniles into drug trafficking. Youngsters under the age of sixteen are immune from the harsher provisions and are known to be used as couriers by narcotics dealers.⁹⁴

As a result of the findings of the city's "Addiction Services Agency," the agency's Commissioner, Jerome Hornblass, urged the New York legislature to "consider decriminalization" as a solution to the state's narcotics problem.⁹⁵ In addition, Hornblass noted that the survey of the judges and officials working in the field of "drug treatment" expressed a "common desire" for the state to "de-emphasize the use of courts and law enforcement agencies to deal with the drug problem." According to Hornblass, the problem of narcotics addiction (the reason many were and arrested and convicted of felonies) should be considered an "emotional and physical problem, rather than a crime."⁹⁶

The credibility of the Rockefeller laws were challenged later in 1977, in *Carmona v. Ward*, when sentences of three women convicted in New York under the laws had their sentences declared "unconstitutional".⁹⁷ *Carmona* was a habeas corpus proceeding where three women challenged the "constitutionality of their

88 Madison Gray, *A Brief History of New York Rockefeller Laws*, TIME, Apr. 2, 2009, available at <http://www.time.com/time/nation/article/0,8599,1888864,00.html>

89 *Id.*

90 John M. Scheb, CRIMINAL LAW 239 (Cengage Brain.com 2008).

91 *Id.* at 239.

92 Gray, *supra* note 88.

93 Gray, *supra* note 88.

94 Selwyn Raab, *Stiff Antidrug Laws Held No Deterrent*, N.Y. TIMES, Jan. 2, 1977, sec 1, p.1.

95 *Id.*

96 *Id.*

97 *Carmona v. Ward*, 436 F. Supp 1153 (S.D.N.Y. 1977).

confinement” as a result of their convictions for drug possession under the Rockefeller laws.⁹⁸ The women, all residents of New York, were Martha Carmona, Donna Foggie, and Roberta Fowler. All three had been convicted of violating the Rockefeller laws and all three contested the constitutionality of the laws on various grounds.⁹⁹ Judge Constance Baker Motley, the legendary civil rights attorney who was then serving as a federal judge in New York, summarized the arguments of the three women as follows:

Petitioners have attacked the 1973 drug law in numerous respects, notably (1) the mandatory indeterminate life sentences for all class A drug offenders; (2) the preclusion of plea bargaining for A-III felony offenders (which has been eliminated during the pendency of this action); (3) the mandatory lifetime parole provision without possibility of discharge (which has also been altered during the pendency of this action to permit class A drug felons to be discharged from parole on the same basis as all other parolees); (4) the predication of probation, in part, upon a recommendation from the prosecutor due to the defendant’s cooperation; and (5) the denial of bail pending appeal.¹⁰⁰

Specifically, the women were attacking the laws due to the severe sentences they received in comparison to the acts for which they were convicted, which consisted of possession or the sale of a small amount of illegal narcotics.¹⁰¹ None of the women were violent offenders and none had a long history of criminal convictions for any offense.¹⁰² Defendant Fowler, whose conviction could have resulted in life in prison, had been arrested only once prior to her arrest for the charge for which she was incarcerated at the time of the habeas corpus proceeding.¹⁰³ Ms. Fowler’s crime was a \$20 purchase of cocaine and delivering the purchase to an informant.¹⁰⁴

Judge Motley’s decision to reverse the sentences was no surprise considering it was based on constitutional reasoning related to the Eighth Amendment.¹⁰⁵ Judge Motley held that the sentences imposed upon the women were unconstitutional because the sentences, in their severity, violated the Constitution’s ban against “cruel and unusual punishment.”¹⁰⁶ In Judge Motley’s view, no matter how the state sought to pursue its arguments, lengthy sentences for such inciden-

98 *Id.* at 1157.

99 *Id.* at 1157-60.

100 *Id.* at 1161-62.

101 *Id.* at 1157-60.

102 *Id.*

103 *Carmona*, 436 F. Supp at 1158-60.

104 *Id.*

105 *Id.*

106 *Id.*

tal amounts of illegal narcotics without a history of criminal activity or convictions discredited the application of the law:

Not only is the treatment of A felony drug offenders unique in its severity among non-capital crimes in New York, however, but it is also virtually unique among all the States of the Union. The New York Court of Appeals duly noted in the *Broadie* case that “drug trafficking is punished more severely in this State than in other jurisdictions.” By comparison, in apparently no other state would these petitioners, for these offenses, today be subjected to mandatory life sentences, with limited provisions for plea bargaining, and no possibility of discharge from eventual parole, if any.¹⁰⁷

On appeal, the *Carmona* decision was overturned. The appeals court rejected the Eighth Amendment analysis of Judge Motley. Indeed, the higher court rested the logic of its reversal on the same flawed arguments that started drug prohibition decades ago:

No decision of the Supreme Court, this court or the highest court of the State of New York has ever found a sentence of imprisonment to transgress the Eighth Amendment merely because of its length. There may well be such a case but this is surely not it. In view of the extraordinary crisis faced by the State of New York, caused by the crime of drug trafficking, we cannot agree with the district court that the punishments meted out to the appellees here are constitutionally defective.¹⁰⁸

A dissent in the *Carmona* appeal contested this analysis and strongly suggested that the reversal was incorrect.¹⁰⁹ The rationale of the dissent, as alluded to by Judge Motley in her trial court ruling, stated that the sentence was so severe it is, in fact, unconstitutional under the Eighth Amendment.¹¹⁰ However, the real importance of the reversal is that it perpetuates the failed policy of prohibition and incarceration as it addresses drug use.¹¹¹ The *Carmona* decision didn’t reveal the failure of the policy, but was a suggestion that the U.S. and the states could change its approach to drug control.

Other pressure mounted on the nation’s drug control policy that was important to the debate. Kurt Schmoke, current Dean of the Howard University School of Law, altered the debate over drug control in the United States by suggesting that a different approach to the problem was in order in 1988.¹¹² Schmoke, then-

¹⁰⁷ *Id.* at 1166.

¹⁰⁸ *Carmona v. Ward*, 576 F.2d 405, 417 (2nd Cir. 1978).

¹⁰⁹ *Id.* at 420.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Baltimore Mayor Supports Legalization of Illicit Drugs*, N.Y. TIMES, Sept. 30, 1988, at B4, available at <http://www.nytimes.com/1988/09/30/us/baltimore-mayor-supports-legalization-of-illicit-drugs.html>.

mayor of the city of Baltimore, Maryland, in testimony before a U.S. congressional select committee called for “a measured and carefully implemented program of drug decriminalization” that resembled U.S. policy immediately following prohibition.¹¹³ In his testimony, Schmoke also stated the following:

Providing legal access to currently illicit substances carries with it the chance, although by no means the certainty, that the number of people using and abusing drugs will increase . . . But addiction, for all of its attendant medical, social and moral problems, is but one evil associated with drugs. Moreover, the criminalization of narcotics, cocaine and marijuana has not solved the problem of their use.¹¹⁴

Defenders of the status quo – the law enforcement approach to narcotics control – were quick to criticize Schmoke and his proposal for an alternative approach to the drug control issue, even at the congressional hearing.¹¹⁵ Yet, the defenders of the existing policy were unable to offer a solution to the control of illegal narcotics except the same failed policies.¹¹⁶

The defenders of the existing policy also failed to acknowledge that Schmoke’s proposal was not based upon a search for morality, nor did they acknowledge that the drug prohibition approach that Schmoke criticized increases crime and does not reduce addiction.¹¹⁷ Schmoke’s proposal did not result in significant policy changes either. It did provide a more vibrant public discussion of an issue of enormous importance to the public and some dialogue that suggested an approach not based upon morality.¹¹⁸

In January 1998, the prohibition approach to drug control was again called into question when Governor George Pataki of New York “commuted the prison sentences of three people serving long mandatory sentences for nonviolent drug crimes.”¹¹⁹ Governor Pataki had granted clemency previously to individuals serving prison time for convictions under Rockefeller laws.¹²⁰ In 1995, Pataki had called for reform of the long discredited laws.¹²¹

Additional criticism of the Rockefeller laws focused upon the failure to provide treatment to individuals with narcotic addiction problems and that the laws “tied the hands of judges” in mandating lengthy prison terms for individuals con-

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 Mick Rood, *Schmoke Sees Some Small Steps Towards Decriminalization*, THE BALTIMORE SUN, Nov. 2, 1990, available at http://articles.baltimoresun.com/1990-11-02/news/1990306206_1_decriminalizing-drugs-schmoke-drug-addiction.

119 *Critics Say Rockefeller Drug Laws Pack the Prisons* . . . N.Y. TIMES, Jan. 19, 2009.

120 *Id.*

121 *Id.*

victed of possession of small quantities of illegal drugs.¹²² The laws faced a familiar assortment of arguments, including the mass incarceration of “tens of thousands of low-level non-violent drug offenders who wasted away in prison” because of the mandatory sentences of the Rockefeller laws.¹²³ By 2009, after thirty-five years of failure, the Rockefeller laws were finally targeted by the New York legislature for repeal.¹²⁴

In March 2009, the New York legislature and Governor David Patterson agreed to change the long-standing laws.¹²⁵ Judges in New York would be able to send some individuals into treatment as opposed to sentencing individuals for extended prison terms for the possession of small quantities of illegal narcotics.¹²⁶

II. THE WAR ON DRUGS: AN END IN SIGHT?

The “War on Drugs,” is coming to an end, as we know it in the United States. In 2008, criticism of the “war” reached a “tipping point”¹²⁷ when it was revealed the U.S. had the highest incarceration rate in the world.¹²⁸ The direct cause of this huge incarceration rate was the “war on drugs” and in particular, U.S. policy on the control of drugs through the familiar tactic of prohibition and mass incarceration.¹²⁹

By 2007, millions of individuals were incarcerated and black men comprised a disproportionate number of those serving prison times for non-violent drug offenses even though the majority of drug users in the U.S. were and are white.¹³⁰ According to the Bureau of Justice Statistics, over 1.5 million individuals were incarcerated in state and federal prisons in 2007.¹³¹ The Sentencing Project reports that between 1980–2005, the number of individuals in prison for drug of-

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Editorial, *Rockefeller Laws: An End in Sight*, N.Y. TIMES, Feb. 9, 2009, at A-22.

¹²⁵ Jeremy W. Peters, *Revisions in Drug Laws Means Resentencing Pleas*, N.Y. TIMES, Mar. 29, 2009, at A16.

¹²⁶ *Id.*

¹²⁷ The “tipping point” is a term coined by writer, Malcolm Gladwell from his book, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE THE DIFFERENCE* (Back Bay Books 2002). The tipping point is the point where major change occurs, public opinion shifts on an issue, or the public decides collectively to move in a certain direction.

¹²⁸ *One in Every 100 Adults Behind Bars*, THE SEATTLE TIMES, Feb. 29, 2008, available at http://seattletimes.nwsources.com/html/nationworld/2004250195_prison29.html.

¹²⁹ *Id.*

¹³⁰ Brian Gilmore, *The Court Corrects an Injustice*, THE CORNING (N.Y. Leader) Dec. 13, 2007, at 4.

¹³¹ United States Department of Justice Bureau of Justice Statistical Bulletin, Mid year 2007.

fenses increased 1100 percent.¹³² Of the individuals incarcerated during that period, 60 percent possessed no history of violence or drug distribution.¹³³

According to the American Legislative Exchange Council there was and is prison overcrowding across the nation, with both state prisons and federal prisons all beyond their capacity.¹³⁴ This led to the increased calls over the years for change and action by the judiciary on the issue, particularly by Justice Anthony Kennedy.¹³⁵ As this article is being completed, prison overcrowding has led the state of California to seek the release of 40,000 non-violent offenders in order to relieve overcrowding.¹³⁶

In 1984, Congress created the U.S. Sentencing Commission, a permanent commission charged with evaluating the ongoing effects of sentencing in the criminal justice system.¹³⁷ While it is not exclusively focused upon sentencing related to illegal drug convictions, such a goal is part of the focus of the Commission.¹³⁸ Two U.S. Supreme Court cases, *United States v. Booker*¹³⁹ and *United States v. Kimbrough*,¹⁴⁰ are notable for their connection to the work of the U.S. Sentencing Commission as a result of interpretations of the guidelines promulgated by the commission for sentencing.

*United States v. Booker*¹⁴¹ involved an individual who was sentenced pursuant to a jury verdict to a period of incarceration of nearly twenty-two years in prison for possession of crack cocaine.¹⁴² However, at sentencing in the case, the judge increased the defendant's sentence to thirty years in prison based upon additional evidence.¹⁴³ The judicial challenge in the case was to the increased sentence. *Booker* noted that the guidelines for sentencing were drafted by the Commission and not Congress and do not provide for allowing a judge to venture outside of

132 Mark Mauer and Ryan S. King, *A 25 Year Quagmire: The War on Drugs and Its Impact on American Society*, The Sentencing Project, September 2007, available at http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf 2-3.

133 *Id.*

134 *A Plan to Reduce Prison Overcrowding and Violent Crime*, THE STATE FACTOR, Jul. 2007, at 1.

135 *Mandatory Sentencing Is Criticized by Justice*, N.Y. TIMES, Mar. 10, 1994, available at <http://www.nytimes.com/1994/03/10/us/mandatory-sentencing-is-criticized-by-justice.html>. See also Brad Wright, *Justice Kennedy criticizes mandatory minimum sentences*, CNN, Apr. 9, 2003, available at http://articles.cnn.com/2003-04-09/justice/kennedy.congress_1_sentencing-guidelines-sentencing-rules-mandatory-minimum-sentences?_s=PM:LAW.

136 *Plata v. Schwarznegger*, 603 F.3d 1088 (9th Cir. 2010).

137 About the Commission, http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf.

138 *Id.*

139 543 U.S. 220 (2005).

140 552 U.S. 85 (2007).

141 543 U.S. 220 (2005).

142 *Id.* at 221.

143 *Id.* at 222-223.

the guidelines as a result of facts outside the factual findings of the trial.¹⁴⁴ Stevens' contention was that this was a Sixth Amendment violation because Booker, the defendant, had a right for a jury to be the trier of fact in his case and not for a judge to independently apply facts not in the record in order to increase his punishment.¹⁴⁵ The judge in *Booker* denied Booker this right with the sentence but more importantly, created doubt as to certain provisions of the sentencing guidelines as drafted by the Commission.¹⁴⁶

But the most important component of *Booker* is that the Court reviewed the guidelines promulgated by the Commission and provided guidance to judges when rendering sentences under the guidelines as intended by Congress.¹⁴⁷ *Booker* did not result in a dramatic change in the law but it did strongly suggest that the guidelines as written contained some inconsistent language.¹⁴⁸ For these reasons, *Booker*, comprised of two opinions (one drafted by Justice Stevens and the other by Justice Breyer) rendered the sentencing guidelines advisory as opposed to mandatory.¹⁴⁹

However, the opinion rendered by the Court in *United States v. Kimbrough* is a much more important holding than *Booker*. In *Kimbrough*, the Court finally decided to provide judges with clarity regarding interpretations of the guidelines.¹⁵⁰ Unlike in *Booker*, the Court stated emphatically what judges were allowed to do under the law.¹⁵¹

Kimbrough is a case involving Gulf War veteran Derrick Kimbrough who was convicted of various narcotics violations and could have received various sentences under the guidelines because he was convicted for the possession of both crack cocaine and powder cocaine.¹⁵² *Kimbrough* ultimately is the case that represents another of the serious problems with drug enforcement in the U.S. in recent years: the difference between how crack cocaine possession is treated as opposed to powder cocaine:¹⁵³

Although chemically similar, crack and powder cocaine are handled very differently for sentencing purposes. The 100-to-1 ratio yields sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs. This disparity means that a major supplier

144 *Id.*

145 *Id.*

146 *Id.*

147 *United States v. Booker*, 543 U.S. 220, 222 (2005).

148 *Id.* at 223.

149 *Id.* at 245.

150 *Kimbrough v. United States*, 552 U.S. 85 (2007).

151 *Id.*

152 *Id.* at 92.

153 *Id.* at 94-95.

of powder cocaine may receive a shorter sentence than a low-level dealer who buys powder from the supplier but then converts it to crack.¹⁵⁴

The District Court judge in *Kimbrough* sentenced the defendant, Kimbrough, to a lesser sentence than what was traditionally rendered under the guidelines in the mandatory era before *Booker* simply because the court contended that the sentence was “greater than necessary” to accomplish the goals of the guidelines set forth by the commission.¹⁵⁵ The Court upheld the decision by the District Court in *Kimbrough* (reversing the Fourth Circuit’s reversal) and made it clear that judges could weigh other facts in sentencing as long as the sentence is reasonable.¹⁵⁶

In August 2010, the small transformation of the sentencing laws that began under *Booker* and *Kimbrough* was further advanced when the federal government recognized the sentencing disparities between crack cocaine and powder cocaine and passed the Fair Sentencing Act.¹⁵⁷ While the law does not change the failed prohibition approach to drug use, it is an acknowledgement that the manner in which drug control is administered in the U.S. contains problems:

For the past three decades, those arrested for crack offenses – mostly young, African American men – faced far harsher penalties than the white and Hispanic suspects most often caught with powder cocaine. A person found holding 500 grams of powder cocaine would face a five-year mandatory minimum; crack offenders would have to be in possession of a mere 5 grams to face the same obligatory sentence. Crack offenders faced a 10-year mandatory minimum for carrying 10 grams of the drug; the same penalty would not kick in for a powder-cocaine suspect unless caught with 1,000 grams.¹⁵⁸

Unfortunately, while these court cases and the Fair Sentencing Act represent a change in the “war on drugs,” the prohibition approach remains the status quo. As for the poor, and especially those residing in public housing, the changes in the law are technically irrelevant because of the harsh penalties associated with drug violations for persons residing in public housing.¹⁵⁹

154 *Id.* (citation omitted).

155 *Id.* at 85, 92.

156 *United States v. Kimbrough*, 552 U.S. 85, 111 (2007).

157 *The Fair Sentencing Act corrects a long time wrong in cocaine cases*, WASH. POST, Aug. 3, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204360.html>.

158 *Id.*

159 *See infra*, notes 166 and 178.

III. THE POOR

A. Morality

Social critic and Columbia University sociology professor Herbert J. Gans wrote in his 1995 book, *The War Against the Poor*¹⁶⁰ that for much of its history, “America has been waging war against many of its poor people.”¹⁶¹ He asserts that this war is and has been “waged with a variety of weapons,” and that drug control policy is just one of the more recent manifestations to purposely remove the poor from society as an “underclass.”¹⁶²

Gans’ suggestion is that many of the policies the poor confront on a daily basis is intentional “moral surveillance”¹⁶³ based upon our own prejudices and not any direct interaction that justifies this approach. Society, in other words, has reached certain conclusions with respect to the poor (in this case, the poor and narcotics) and has decided to seek control over their lives, in various ways.

Drug testing, without any reasonable suspicion, or justification comports with Gans’ ideal of a “war” because the control of narcotics in the U.S. has always been waged based upon some government quest to impose morality upon the public.¹⁶⁴ The various proposals over the years and proposals currently under consideration to link the receipt of government benefits with drug testing are the latest example of that war.¹⁶⁵ The use of the welfare reform law passed in 1996 to encroach into the lives of the poor is the perfect example of the policy.¹⁶⁶ Poor people, especially poor women, were targeted by welfare reform in particular:

[W]elfare reform in the 1990’s has linked the welfare system more closely and more explicitly with the criminal justice system, reflecting an increasingly punitive attitude towards low-income mothers. Denial of a woman’s welfare benefits because of a woman’s criminal record is one of an ever-increasing list of civil consequences of criminal offenses – loss of public housing (and often of private housing as well) denial of student loans, loss of employment, loss of child custody or parental rights, loss of immigrant status, and loss of the vote.¹⁶⁷

It is easy to understand Gans’ overall point when considering welfare reform. Gans contends that the policy towards the poor has always been to stigmatize

160 Herbert J. Gans, *THE WAR AGAINST THE POOR* 1 (Basic Books 1995).

161 *Id.*

162 *Id.* at 3.

163 *Id.* at 11.

164 *Id.* at 1.

165 Miron, *supra* note 28.

166 Amy E. Hirsch, *Bringing Back Shame: Women, Welfare, and Criminal Justice*, TEMP. POL. & CIV. RTS. L. REV. Spring 2001, at 417.

167 *Id.*

them and to lessen the value of their lives.¹⁶⁸ In 1995, immediately preceding the passage of welfare reform and the new drug control approaches to the lives of the poor, the manner in which the United States was attempting to control illegal narcotics had been thoroughly discredited.¹⁶⁹ Ethan Nadelmann, founder of the Drug Policy Alliance, set forth the case that the U.S. approach to drug control was misguided before the government in the subsequent years decided to escalate their drug prohibition efforts.¹⁷⁰

The war on drugs is over. After eight decades of interdiction, prohibition and punishment, the results are in: there are now more than 330,000 Americans behind bars for violating the drug laws. We are spending over \$20 billion per year on criminal-justice approaches, but illegal drugs are available in greater supply and purity than ever before. Cynical phrases such as *zero tolerance* and *drug-free society* substitute for thoughtful policies and realistic objectives.¹⁷¹

Prior to Nadelmann's pronouncements and evidence, Baltimore's mayor, Kurt Schmoke, gave his famous testimony before the United States Congress on the decriminalization of drugs in 1989.¹⁷² New York Governor George Pataki spoke for the reform of drug laws in 1995.¹⁷³

To also demonstrate the true failure of drug prohibition it should be noted that 1995 was also the year that the nation was slated to be "drug free" according to the "The Anti-Drug Abuse Act of 1988." The act stated that it was the "declared policy" of the nation to "create a Drug Free America."¹⁷⁴ By 1995, drug use and drug related crimes remained extremely high mostly because of the policy of prohibition.¹⁷⁵

Perhaps the use of drugs by the poor back then could be the reason for the change in policy. Actually, though, when policies began to change towards those in public housing and the poor with respect to drug enforcement in the 1990's, drug use amongst the general population and those receiving government benefits was the same.¹⁷⁶ A 2004 study in Michigan conducted by the American Civil Liberties Union determined that drug use was about the same between the gen-

168 Gans, *supra* note 160, at 57.

169 Ethan Nadelmann, *Towards a Sane National Drug Policy*, Rolling Stone Magazine, May 5, 1994, at 24.

170 *Id.*

171 *Id.*

172 *Supra* note 112.

173 *Supra* note 112.

174 21 U.S.C. § 848.

175 National Institute of Justice, Drug Use Forecasting Report 1995, <http://www.ncjrs.gov/pdffiles/duf1995.pdf> (last visited Dec. 3, 2011).

176 <http://www.nih.gov/news/pr/oct96/niaaa-23.htm> (last visited Dec. 3, 2011).

eral population and those receiving government benefits.¹⁷⁷ These trends have held steady over the years despite the fact that at the onset of the crack epidemic in 1987 it appeared that the poor were using more illegal drugs than the general population.¹⁷⁸

B. *The law of drug testing the poor*

The debate over how to address control of narcotics in the U.S. became much more intense in the political realm despite the fact that the policy approach proposed by politicians in the face of failure had lost its credibility.¹⁷⁹ President Clinton, who signed welfare reform into law, is also responsible for the “one strike”¹⁸⁰ policy in public housing that is consistent with the long failed draconian approach to drug control perpetuated by the nation’s lawmakers.¹⁸¹

President Clinton’s call for this strict policy on tenancy in public housing and to prevent drug dealers from residing in public housing led to all kinds of exclusionary tactics related to drug prohibition.¹⁸² The policy, and the consistent reliance upon this approach since, is the ‘War on Drugs’ in the lives of the poor, and has resulted in the denial of “access to public housing for virtually any crime.”¹⁸³ The Flint Housing Commission proposal, discussed briefly in the introduction, is part of this political culture that has emerged.

In August 2010, the Flint Housing Commission announced its proposed plan to begin drug testing public housing residents, a proposal the commission had discussed and considered for months.¹⁸⁴ According to a media account at the time, the tests, for any resident over the age of 18, would be mandatory whether the resident was using drugs or not.¹⁸⁵

The American Civil Liberties Union (“ACLU”) immediately contacted Rodney Slaughter, Executive Director of the commission, by letter, challenging the legality of the proposal and urged reconsideration of implementation of the

177 Welfare Drug Testing, American Civil Liberties Union, April 15, 2004.

178 Peter Kerr, *Rich v. Poor: Drug Patterns are Diverging*, N.Y. TIMES, Aug. 30, 1987, available at <http://www.nytimes.com/1987/08/30/us/rich-vs-poor-drug-patterns-are-diverging.html>.

179 EVA BERTRAM, *DRUG WAR POLITICS: THE PRICE OF DENIAL* x (University of California Press 1996).

180 In the context of drug control in public housing, ‘one strike’ is simply that one violation of the rules of public housing related to possession or use of narcotics of a member of the household or a guest and the family or individual can lose the subsidy provided by the government and can be evicted from their unit.

181 1996 *State of the Union* address, Jan. 23, 1996, reprinted in The Washington Post, available at <http://www.washingtonpost.com/wp-srv/politics/special/states/docs/sou96.htm#welfare>.

182 MICHELLE ALEXANDER, *THE NEW JIM CROW* 142-43 (The New Press 2010).

183 *Id.*

184 Letter from ACLU, Michigan to Rod Slaughter, Aug. 12, 2010, available at <http://www.aclumich.org/sites/default/files/file/flinthousingcommission.pdf>.

185 *Id.*

plan.¹⁸⁶ Michael J. Steinberg, Legal Director of the ACLU Michigan Chapter, and Attorney, Gregory T. Gibbs, wrote the letter to Slaughter and specifically identified the inherent and obvious problems with the drug testing program proposed by the Flint commission.¹⁸⁷

The ACLU, in its communication to Slaughter, described the proposed policy as “unconstitutional” because it “unfairly singles out poor people for privacy violations, and there are more effective means to address drug abuse.”¹⁸⁸ The letter adds that the “proposed policy feeds into the worst and most unfair stereotypes about poor people.”¹⁸⁹ According to Steinberg and Gibbs, “the policy assumes people applying for assistance are violating the law and treats them like criminals without basis.”¹⁹⁰ The letter also advised Slaughter that drug testing is an “ineffective and fiscally irresponsible means to discover drug abuse.”¹⁹¹

In the letter, the ACLU also discussed in great detail a previous dispute handled by the ACLU of Michigan that sought to impose drug testing upon individuals receiving government benefits in that state.¹⁹² It is an extremely important case considering these latest proposals by elected officials for more policies mandating drug testing specifically on individuals who are receiving government benefits normally associated with poverty. The case is also important because there are few cases of this nature available for review to consider the serious legal issues raised by drug testing.

The case invoked in the ACLU’s letter to Mr. Slaughter is called *Marchwinski v. Howard* (hereinafter “*Marchwinski*”) and provides considerable guidance with respect to the legality of such drug tests. *Marchwinski* begins with a complaint filed by several recipients of welfare assistance who were subject to drug testing even though there was no reason to believe they were, in fact, drug users.¹⁹³ The women (the plaintiffs) received benefits through Michigan’s Family Independence Program or FIP, a program connected to federal welfare benefits.¹⁹⁴ The requirement that the women (the recipients who sued) could be subjected to random drug testing¹⁹⁵ stemmed from the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”)¹⁹⁶ signed into law¹⁹⁷ by President Clinton.

186 *Id.*

187 *Id.*

188 *Id.*

189 *Id.*

190 Letter from ACLU, Michigan to Rod Slaughter, Aug.12, 2010, available at <http://www.aclu-mich.org/sites/default/files/file/flinthousingcommission.pdf>.

191 *Id.*

192 *Id.*

193 *Marchwinski v. Howard*, 113 F.Supp 2d 1134 (E.D. Mich. 2000).

194 *Id.* at 1135.

195 21 U.S.C. § 862b.

196 Pub. L. No. 104-193, 110 Stat. 2105.

Among other things, PRWORA authorized but did not “mandate States to test Temporary Assistance to Needy Families (“TANF”) recipients for use of controlled substances and to sanction those recipients who test positive.”¹⁹⁸ Michigan was the first state to attempt to exercise this authority by passing a state law to implement drug testing of TANF recipients.¹⁹⁹

The women in *Marchwinski* sued to enjoin implementation of a program of “suspicionless” drug testing on welfare recipients under the program.²⁰⁰ The court granted a temporary restraining order in the case and held that the drug testing proposed by the program was, in fact, a suspicion-less search and that the state did not meet the standard necessary to be able to engage in a suspicion-less search of an individual absent reasonable suspicion.²⁰¹ Indeed, the importance of *Marchwinski* is the Fourth Amendment analysis of the intrusive search without any reason to believe the person is, in fact, using illegal substances:

Historically, the Supreme Court has generally viewed the Fourth Amendment as requiring “some quantum of individualized suspicion” for a search or seizure to be constitutional. *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976). Furthermore, it is universally agreed that the collection and testing of urine is a search within the meaning of the Fourth Amendment. *See, e.g., Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 617 (1989).²⁰²

Proposed drug testing is deemed a search pursuant to the Fourth Amendment to the United States Constitution, therefore the lack of reasonable suspicion in the case presented problems for the state of Michigan in implementing the program of drug testing.²⁰³ *Marchwinski* noted that the “Supreme Court has generally viewed the Fourth Amendment as requiring ‘some quantum of individualized suspicion’ for a search or seizure to be constitutional.”²⁰⁴ There are instances where drug testing is allowed even though there is no evidence that the individual was suspected of using the drugs. According to the law expressed in *Marchwinski*, the testing is allowed under very “limited circumstances.”²⁰⁵

[T]he “core issue” . . . was whether the drug testing was warranted by a special need. It stated that not only must there be a special need, but if there is one, ‘it must be substantial-important enough to override the individual’s acknowledged privacy interest [and] sufficiently vital to suppress

197 *Id.*

198 *Marchwinski*, 113 F.Supp 2d at 1135.

199 *Id.* at 1135 (Michigan implemented a pilot program through its Family Independence Agency; this pilot program was the reason for filing of the complaint by the women).

200 *Marchwinski*, 113 F. Supp. 2d at 1138.

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.*

205 *Id.* at 1138.

the Fourth Amendment's normal requirement of individualized suspicion.²⁰⁶

In *Marchwinski*, the state argued that there was a strong public interest in preventing drug abuse and child neglect among Michigan recipients of welfare benefits because of the direct correlation between drug abuse and neglect.²⁰⁷ This argument failed. The court held that child abuse and neglect were not the reasons for passing the welfare reform law.²⁰⁸ Indeed, the new welfare law was no longer an entitlement program and focused specifically on attempting to remove individuals from the welfare system into employment.²⁰⁹

In sum, the plaintiffs in *Marchwinski* were able to sustain the request for preliminary injunction and halt the program as configured because they could (and did) meet all of the requirements for the injunction. According to the court, the searches (the mandatory drug testing) without suspicion made it likely that the recipients (plaintiffs) would succeed on the merits.²¹⁰

In addition, the court held that the searches (the drug testing of anyone) would result in irreparable harm because they are unconstitutional, that there was little harm to the defendants because the acts they were prohibited from conducting were unconstitutional searches, and the public interest is certainly served by stopping a government entity from randomly drug testing anyone receiving welfare benefits.²¹¹

While *Marchwinski* was reversed and remanded by the United States Court of Appeals for the Sixth Circuit, the reversal was vacated as the court voted to grant an en banc review that never occurred.²¹² The legal effect of the en banc review with no decision is the original decision from the district court is the law of the case.²¹³ In addition, while there is no explicit order for drug testing in all public housing programs funded by the U.S., drug control policy using drug testing against individuals who happen to be poor continues to be considered.²¹⁴

It is not only welfare reform that provided the government the ability to attempt to drug test individuals receiving benefits in 1996 as in the *Marchwinski*

206 *Id.* at 1139-1140.

207 *Marchwinski*, 113 F.Supp 2d at 1139-1140.

208 *Id.*

209 *Id.* at 1141-1142.

210 *Id.* at 1143.

211 *Id.*

212 *Marchwinski v. Howard*, 309 F.3d 330 (6th Cir. 2002), *vacated*, 319 F.3d 258 (6th Cir. 2003).

213 *Marchwinski v. Howard*, 319 F.3d 258 (6th Cir. 2003).

214 Nancy Badertscher, *Law Would Require Drug Test For Unemployment Benefit*, THE ATLANTA JOURNAL-CONSTITUTION, Mar. 17, 2010, available at <http://www.ajc.com/news/law-would-require-drug-376097.html>. (According to reports, various proposals to test individuals receiving food stamps, unemployment benefits, and welfare benefits have been set forth by various public officials. For example, a Georgia state legislator proposed drug testing individuals who receive unemployment benefits.).

case but in 1988, the Anti-Drug Abuse Act²¹⁵ had already provided momentum for these efforts. The act, *inter alia*, afforded public housing authorities the ability to deny housing assistance to individuals if they, their family member, or guests are engaged in drug activity.²¹⁶ This portion of the law is the language that likely led to drug testing efforts on tenants and then subsequent challenges.²¹⁷

The subtle suggestion in the law's agenda is that if the agency is seeking to maintain a drug-free community, it can implement some reasonable measures to identify those who are using drugs. How this comports with the Fourth Amendment's prohibition on unreasonable searches is difficult and has still not been resolved. Searches pursued without any suspicion fall into this category rendering most attempts to require the drug testing of individuals residing in public housing suspect.²¹⁸

When proposing drug testing for public housing residents, Rodney Slaughter, Executive Director of the Flint Housing Commission, stated if you are receiving government benefits, "then you should also have the responsibility of showing you're a productive citizen, as well as having responsibility for the home supported by taxpayer dollars."²¹⁹

It is doubtful that Slaughter actually believes this statement. If this were true, many more Americans would be subject to drug testing. We all receive various benefits from the government and most of us are not subject to drug testing on a random basis to continue to receive that benefit. Slaughter's statement is really about imposing the will of the government upon the poor. The most well known study that compared drug use among the poor to drug use rates of the general population revealed that there was no significant difference in drug use between the poor and the general population.²²⁰ The study, completed in 1996, was released in the period of time when the government decided to shift its drug policy against the poor to more draconian, inequitable policies.²²¹

Would any U.S. citizen agree to a drug test for receiving mortgage insurance protection from the Federal Housing Administration or the Veteran's Adminis-

215 SHAHID SHAIDULLAH, *CRIME POLICY IN AMERICA: LAWS, INSTITUTIONS, AND PROGRAMS*, 99-100 (University Press of America, 2008).

216 David Lang, *Get Clean or Get Out: Landlords Drug Testing Tenants*, 2 WASH. U.J.L. & POL'Y 459 (2000).

217 *Id.* at 474.

218 *Marchwinski*, 113 F. Supp. 2d at 1138.

219 WJRT Mid Michigan Channel 12 News (ABC local news broadcast May 17, 2010.), *available at* <http://abclocal.go.com/wjrt/story?section=news/local&id=7446068>.

220 Chuck and Pat Wemstrom, *No Drug Testing On Welfare*, FREEPORT JOURNAL-STANDARD, (October 18, 2010), *available at* <http://www.journalstandard.com/opinions/guestcolumns/x1943814765/MY-VIEW-No-drug-testing-for-welfare>. (Authors are referring to 1996 report by the National Institute of Alcohol Abuse and Alcoholism).

221 NATIONAL INSTITUTE IN ALCOHOL ABUSE AND ALCOHOLISM, NATIONAL INSTITUTE OF HEALTH, *available at* <http://www.niaaa.nih.gov/NewsEvents/NewsReleases/Pages/welfare.aspx>.

tration? How about if your loan explicitly stated that in order to continue to receive the mortgage insurance protection, you have to agree to random drug tests or mandatory drug tests for the first five years of the loan?

Would anyone deducting interest from their mortgage on their tax return agree to random drug testing each year they receive that government benefit? The ACLU of Michigan, in its letter to Rod Slaughter, raised this issue:

Even in the context of housing, only the poor are forced to submit to tests. In 2009, the mortgage interest deduction was estimated to cost the government \$100 billion. This specific tax deduction is the largest government subsidy for housing and one of the most expensive tax deductions. However, no drug tests are required as a condition of receiving the mortgage interest deduction.²²²

These questions force a question: why are subsidies for the poor different from subsidies for the middle class or the working class who might also be using illegal drugs?

This line of inquiry can be expanded once you consider this discussion is about government benefits and social conduct. Should individuals in government training programs be drug tested? How about artists and writers who received grants from the National Endowment for the Arts?²²³ Which government benefit should grant immunity to the recipient from government intervention into their lives to be certain that the benefit isn't subsidizing drug use?

Perhaps Governor-elect of Florida, Rick Scott, in calling for drug testing anyone receiving welfare benefits in his state, answered the question in the same manner it has been offered for decades: "It's practical, and it's fair. We shouldn't be subsidizing people who are doing drugs," Scott noted in November 2010.²²⁴

Scott is implying, as Rodney Slaughter of the Flint Housing Commission implied, the poor are the real problem and not the approach to a social issue that has been around for decades. Aren't we likely subsidizing millions of people in some manner who are using illegal drugs?²²⁵ Neither Slaughter nor Scott ever

222 Letter from Michael J. Steinberg, Legal Director, American Civil Liberties Union of Michigan, to Rod Slaughter, Executive Director, Flint Housing Commission (August 12, 2010), <http://www.aclumich.org/sites/default/files/file/flinthehousingcommission.pdf>.

223 Congress established the National Endowment for the Arts in 1965 as an independent agency of the federal government. To date, the NEA has awarded more than \$4 billion to support artistic excellence, creativity, and innovation for the benefit of individuals and communities. The NEA extends its work through partnerships with state arts agencies, local leaders, other federal agencies, and the philanthropic sector.

224 Boris F. Bastidas, *What's Behind Rick Scott's Push for Drug Testing*, ORLANDO SUN SENTINEL (Dec. 18, 2010), available at http://articles.sun-sentinel.com/2010-12-18/news/fl-drug-test-letter-20101218_1_drug-testing-rick-scott-taxpayer-money.

225 See National Drug Assessment Threat Report 2010, <http://www.justice.gov/ndic/pubs38/38661/38661p.pdf> (According to the Department of Justice, over 25 million individuals in the U.S. used an illicit substance in 2008); Substance Abuse and Mental Health Administration, Press Release,

paused to evaluate whether the real problem is the overall approach to drug control; many others haven't either, at least with respect to government benefits. Various states in the last few years have also introduced legislation that would require drug testing in order to receive government benefits such as food stamps and unemployment benefits.²²⁶

IV. THE ENDURANCE OF THE WAR, AND ADVOCACY

A. Legal Confusion

In September 2009, Journalist Megan Cottrell asked a question: Should public housing residents be drug tested?²²⁷ Cottrell was examining a proposed public housing drug testing program by the Chicago Housing Authority.²²⁸ Cottrell's question of drug testing of public housing residents demonstrates that the issue is still unsettled. Inquiries conducted for purposes of this article revealed that there is drug testing for residents in Chicago public housing, though it is through the privately managed housing.²²⁹

There is drug testing of residents of the Umatilla Reservation Housing Authority in Oregon.²³⁰ In Texas, inquiries revealed that there is no evidence of drug testing by most of the housing authorities in that state.²³¹ Additionally, while Rodney Slaughter reported that his Flint Commission proposal is inspired by drug testing in public housing of Indianapolis public housing residents, inquiries to that city's authority revealed that no such program exists.²³²

The confusion over the constitutionality of drug testing as a condition for the receipt of government benefits does present the following choice for advocates: what does a legal advocate do when the drug testing is imposed more and more on public housing residents and others just for receiving public benefits? The

September 16, 2010, available at <http://www.samhsa.gov/newsroom/advisories/1009152021.aspx> (The National Survey on Drug Use and Health (NSDUH) shows the overall rate of current illicit drug use in the United States rose from 8.0 percent of the population aged 12 and older in 2008 to 8.7 percent in 2009).

226 In June 2010, the Salt Lake Tribune reported that Senator Orrin Hatch of Utah wanted to make drug testing a condition for receiving unemployment benefits. In December 2010, an affiliate of FOX NEWS in Memphis reported that drug testing for those receiving food stamps and welfare benefits was being considered.

227 Megan Cottrell, *Should Public Housing Residents Be Drug Tested?* CHICAGO NOW, (September 3, 2009), available at <http://www.chicagonow.com/blogs/one-story-up/2009/09/should-public-housing-residents-be-drug-tested.html>.

228 *Id.*

229 Jon Junia, Juris Doctorate candidate 2011 – Michigan State University College of Law, conducted inquiries to public housing officials; evidence regarding testing in public housing in Chicago was inconclusive regarding housing that is managed by public institutions.

230 UHRA Starts Drug Test Policy, CONFEDERATED UMATILLA JOURNAL, Mar. 2010, at 1.

231 Lang, *supra* note 216.

232 Lang, *supra* note 216.

answer is easy: the policy should be challenged not only because the policy is likely unconstitutional but also because current drug policy in the U.S. has failed terribly. To allow an outgrowth of that policy to be imposed upon the poor would render advocates derelict in their duty to protect the rights of not only the poor but everyone.

Marchwinski, the case discussed above on the issue of drug testing of government benefits recipients, is instructive in this regard.²³³ While *Marchwinski* relates to welfare benefits and this article is discussing public housing benefits, the parallel is still appropriate because public housing is a government benefit for the poor.²³⁴

However, in order to understand the motivation of public housing authorities seeking to conduct these searches and to pursue a “war on drugs” strategy, it is necessary to briefly examine *U.S. Department of Housing and Urban Development v. Rucker*, the seminal case relating to public housing and the “war on drugs” in the United States.²³⁵ The case is particularly important to this discussion of drug testing because it is a case with direct links to the Anti-Drug Abuse Act of 1988.²³⁶

Rucker is the case of Pearlie Rucker and three other residents of Oakland, California, who were tenants residing in Oakland public housing (Oakland Housing Authority).²³⁷ Rucker, and another tenant, Herman Walker were sued for eviction from their apartments due to violations of their leases and housing authority policy relating to drug illegal activity. Specifically, both Rucker and Walker were to be evicted due to the activities of family members, or in Walker’s case, a guest.²³⁸

The policy of the public housing authority in Oakland was implemented pursuant to the Anti-Drug Abuse Act of 1988 that authorized public housing authorities to “evict a tenant when a member of the tenant’s household or a guest engages in drug-related criminal activity, regardless of whether the tenant knew, or had reason to know, of that activity.”²³⁹

At the time, and now, Housing and Urban Development (HUD) funded properties used the precise language of 42 U.S.C. §1437d(l)(6) to seek to rid the public housing complexes of drug activity.²⁴⁰ The regulations promulgated pursuant to Anti-Drug Abuse Act stated the following:

233 *Marchwinski*, 113 F. Supp. 2d at 1138.

234 *Id.*

235 *U.S. Dept. of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002).

236 *Rucker*, 535 U.S. at 125.

237 *Id.*

238 *Id.* at 126.

239 *Id.* at 127.

240 *Id.* at 127-128.

To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in: (A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or (B) Any drug-related criminal activity on or near such premises. Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.²⁴¹

The tenants insisted in their arguments in *Rucker* that because they were unaware of the illegal activity of their family member or associate, they should not be subject to the language of the statute that focused upon the activity by anyone and not on knowledge.²⁴²

The Supreme Court adopted the former, stating that the language is unambiguous, and in fact, it is unambiguous.²⁴³ Congress intended to impose the same failed draconian policy approach to public housing that it had done on the entire country.²⁴⁴ Instead of mandatory minimums being the punishment; the punishment in public housing was the loss of one's housing subsidy pursuant to eviction.²⁴⁵

This is obvious from the first lines of the opinion by Chief Justice William Rehnquist, who noted that the Anti-Drug Abuse Act of 1988 was passed by Congress because "drug dealers" were "increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants."²⁴⁶ The opinion does not discuss the overall performance of drug control policy in the U.S.²⁴⁷ This approach, the prohibition method of drug control, has failed. If prohibition (and then punishment) has failed in society overall, what evidence is available that supports a prohibition punishment model for public housing that would prove successful?

But most importantly for advocates, *Rucker* does not establish a constitutional basis on which to impose drug testing on public housing residents, though it is an important case for establishing the authority of the government to use some means to address the illegal drug issue.²⁴⁸ Based upon the *Marchwinski* case and the result of the ACLU's tactics in the recent Flint, Michigan dispute over drug testing, attempts to drug test all residents without suspicion can be challenged successfully.²⁴⁹ In other words, there is no legal basis to legally drug test anyone

241 U.S. Dept. of Housing and Urban Dev. v. Rucker, 535 U.S. 125, 136 (2002).

242 *Id.*

243 *Id.* at 130.

244 *Id.* at 134.

245 *Id.* at 128.

246 *Id.* at 127.

247 U.S. Dept. of Housing and Urban Development v. Rucker, 535 U.S. 125, 125-136 (2002).

248 *Id.*

249 *Marchwinski*, 113 F. Supp. 2d at 1138.

who resides in public housing without suspicion; the U.S. Supreme Court has not rendered any opinion on this issue.

B. *New Policy*

There is policy work in the reform of the “war on drugs” that could prove beneficial. Considering that the overall “war on drugs” is undergoing some small degree of reform judging by the progress in sentencing laws, it is time that the approach to the “war on drugs” in poor communities be likewise adjusted to reflect the new reality of illegal drug control. The facts indicate that the prohibition/incarceration approach does not work and it is likely that the “one strike” policies born during the Clinton era are also counterproductive to the goals of the government.²⁵⁰ While it is easy to argue that the costs of drug testing is excessive, it is not a strong argument overall.²⁵¹

U.S. Congresswoman Sheila Jackson-Lee of Texas introduced the “No One Strike Eviction Act of 2009”²⁵² in 2009 in an effort to amend President Bill Clinton’s “one strike” policy. The bill, as introduced by Congresswoman Lee, establishes an internal review process when a tenant is accused of violating “one strike” regulations but also does not prevent a tenant from receiving a benefit from the government if it is just a member of their household.

In other words, the tenant under Congresswoman Lee’s bill could maintain a benefit and the denial, or future denial, of benefits is aimed toward the individual who actually violated drug laws. The law, however, has not moved forward to any degree in Congress, which is not surprising.²⁵³

But the importance of the Congresswoman Lee’s bill is that it separates the actual violators of the law from those simply associated with the tenant – the problem that arose in the *Rucker* case.²⁵⁴ “Innocent tenants” are not punished without review just because one of their family members violates the housing. “[M]itigating circumstances” are considered in the review process.²⁵⁵

Nevertheless, *Rucker* is not about drug testing of public housing residents. *Rucker* is an affirmation of the failed policies of the last century, as is Congresswoman Lee’s bill, despite its attempt to correct a problem in process. This is because whether one agrees or not with the policy, drug testing by the govern-

250 White House Office of National Drug Control Policy, <http://www.whitehousedrugpolicy.gov/publications/factsht/drugdata/index.html> (stating drug use and drug arrests continued to rise in the years following the passage of Clinton’s “one strike” law).

251 ACLU, *supra* note 226 (stating, in response to the Flint, Michigan proposal for drug testing of public housing residents, that the cost of each test was \$42.00. This is an unofficial estimate of the cost. The ACLU did not elaborate with respect to the source of the estimate.).

252 No One Strike Eviction Act of 2009, H.R. 69, 111th Congress (2009), available at <http://www.govtrack.us/congress/bill.xpd?bill=h111-69&tab=summary>.

253 *Id.*

254 *Id.*

255 *Id.*

ment constitutes a search and that is not the crux of the bill.²⁵⁶ Drug testing, legal or illegal, is the equivalent of searching everyone who enters an airport with little, if any, comparable safety considerations and implicates the Fourth Amendment of the U.S. Constitution.²⁵⁷

Surely public housing residents have safety concerns but with the advent of many other kinds of public housing for those in need of affordable housing,²⁵⁸ drug testing of all residents on a mandatory basis is questionable. For example, should an individual receiving a voucher subsidy that is integrated into the community (mixed income area) be tested every year for illegal drug use even though none of that person's neighbors are tested because it is a low crime area?

The second policy consideration is the "War on Drugs" overall. This paper began with a lengthy discussion of the prohibition of narcotics that began the policy over eighty years ago.²⁵⁹ There has been no discernible achievement towards prohibition in eighty years.²⁶⁰ Narcotics have an impact on any community, regardless if it is a poor community, because of government policy and not because of the narcotics. If narcotics were decriminalized, the market for illegal narcotics that exists in poor communities and in communities where public housing is located would no longer exist.²⁶¹ Our society would still have to address the reasons why individuals feel the need to use mood-altering substances, but that is a physiological examination not a social experiment.

If a policy that decreases the focus upon morality is pursued, all of the laws that simply target the poor under the auspices of a failed illegal drug policy will end. Government benefit programs, including programs to provide housing, will then focus upon precisely what they should focus upon anyway: how to assist the poor with transitioning quickly and smoothly out of abject poverty.

256 *National Treasury Employee Union v. Van Raab*, 489 U.S. 656 (1989).

257 *Id.* at 665.

258 JOHN C. WEICHER, *PRIVATIZING SUBSIDIZED HOUSING* 3-4 (AEI PRESS 1997). (While thousands of units of public housing were built between 1936-1975, and were managed by the federal government, the trend has shifted in recent years where various kinds of housing have been built and the federal government is increasingly not managing the properties. Public housing now consists of project-based housing, voucher supported housing, and housing purchased through the low-income housing tax credit program.).

259 TIMOTHY LYNCH, *AFTER PROHIBITION AN ADULT APPROACH TO DRUG POLICIES IN THE 21ST CENTURY* 124 (Cato Institute 2000).

260 *Marchwinski*, 113 F. Supp. 2d at 1138.

261 *Id.*

